

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MELVIN HALE, Ph.D.

Plaintiff,

v.

NEVADA SYSTEM OF HIGHER
EDUCATION,

Defendants.

Case No. 2:22-cv-01321-CDS-EJY

ORDER

AND

REPORT AND RECOMMENDATION

Pending before the Court are Plaintiff's application to proceed *in forma pauperis* ("IFP") and Complaint alleging violation of state and federal civil rights laws. ECF Nos. 1 and 1-1. The Court finds the IFP application is complete and Plaintiff qualifies to proceed without payment of the filing fees. However, the Court recommends dismissing portions of the Complaint with prejudice and portions without prejudice for the reasons stated below.

I. Screening the Complaint

Upon granting a request to proceed *in forma pauperis*, a court must screen the complaint under 28 U.S.C. § 1915(e)(2). In screening a complaint, a court must identify cognizable claims and dismiss claims that are frivolous, malicious, fail to state a claim on which relief may be granted or seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). *Watson v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). To survive § 1915 review, a complaint must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Courts liberally construes pro se complaints and may only dismiss them "if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Nordstrom v. Ryan*, 762 F.3d 903, 908 (9th Cir. 2014) (quoting *Iqbal*, 556 U.S. at 678).

In considering whether the complaint is sufficient to state a claim, all allegations of material fact are taken as true and construed in the light most favorable to the plaintiff. *Wylar Summit P'ship v. Turner Broad. Sys. Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted). Although the standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff must provide

1 more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
 2 A formulaic recitation of the elements of a cause of action is insufficient. *Id.* Unless it is clear the
 3 complaint's deficiencies cannot be cured through amendment, a pro se plaintiff should be given
 4 leave to amend the complaint with notice regarding the complaint's deficiencies. *Cato v. United*
 5 *States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

6 **II. Plaintiff's Complaint**

7 Plaintiff alleges claims of retaliation and race discrimination under Title VII of the 1964
 8 Civil Rights Act ("Title VII") and NRS 613.340, as well as under the Age Discrimination in
 9 Employment Act (the "ADEA") and NRS 613.330. However, portions of these claims are barred
 10 by the Eleventh Amendment to the U.S. Constitution. Other claims are barred because Plaintiff can
 11 only assert these claims upon a showing that he exhausted administrative remedies.

12 A. Failure to Exhaust

13 "Exhausting administrative remedies by filing a timely charge with the EEOC or the
 14 appropriate state agency is a statutory pre-requisite for an employee to pursue litigation under both
 15 Title VII and the ADEA." *Ramirez v. Kingman Hosp. Inc.*, 374 F. Supp. 3d 832, 854 (D. Ariz. 2019)
 16 (citation omitted); *Rosseter v. Industrial Light & Magic*, Case No. C 08-04545 WHA, 2009 WL
 17 764496, at *1 (N.D. Cal. Mar. 20, 2009) (to exhaust all administrative remedies under the ADEA,
 18 plaintiff must allege that he filed an administrative charge with the EEOC within 180 days of when
 19 the alleged unlawful practice occurred). This same rule applies to claims filed under Nevada law.
 20 *Pope v. Motel 6*, 114 P.3d 277, 280 n.6 (Nev. 2005) (internal citation omitted) ("NRS 613.420
 21 requires an employee alleging employment discrimination to exhaust his administrative remedies by
 22 filing a complaint with NERC[, the Nevada Equal Rights Commission,] before filing a district court
 23 action"); *Palmer v. State*, 787 P.2d 803, 804 (Nev. 1990) (citing *Copeland v. Desert Inn Hotel*, 673
 24 P.2d 490 (Nev. 1983) for the proposition that Nevada looks "to the federal courts for guidance in
 25 discrimination cases").

26 In his Complaint, Plaintiff fails to state that he filed a Charge of Discrimination with the
 27 EEOC or NERC. Plaintiff also does not attach a Charge of Discrimination to his Complaint. ECF
 28

No. 1-1. Plaintiff does not attach a Right to Sue letter indicating exhaustion of a Charge. *Id.* For these reasons, there is insufficient information to find Plaintiff may proceed on any of his claims.

B. Sovereign Immunity Under the ADEA.

Plaintiff also faces a problem with sovereign immunity. The Eleventh Amendment bars suits “in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. Amend. XI. “In the absence of a waiver by the state or a valid congressional override, ‘[u]nder the [E]leventh [A]mendment, agencies of the state are immune from private damage actions or suits for injunctive relief brought in federal court.’” *Dittman v. California*, 191 F.3d 1020, 1025 (9th Cir. 1999) (quoting *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198, 201 (9th Cir. 1989)). “Nevada has explicitly refused to waive its immunity to suit under the [E]leventh [A]mendment.” *O'Connor v. Nevada*, 686 F.2d 749, 750 (9th Cir. 1982) (citing NRS 41.031(3) (“The State of Nevada does not waive its immunity from suit conferred by Amendment XI of the Constitution of the United States.”)). The ADEA does not abrogate state sovereign immunity, making the State of Nevada immune from lawsuits under the ADEA. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000). This immunity also shields “arms” of the state, such as the Nevada System of Higher Education. *Ginter v. State Bar of Nevada*, 625 F.2d 829, 830 (9th Cir. 1980). Thus, Plaintiff’s ADEA claims against the Nevada System of Higher Education must be dismissed with prejudice.

C. Plaintiff’s Pendent State Law Claims are Barred.

The State of Nevada and its operating divisions are also immune from suit in federal court under Nevada’s anti-discrimination statutory scheme found at Chapter 613 of the NRS. *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993). The Supreme Court expressly rejected the notion that the judge-made doctrine of pendent jurisdiction can be used to “override” the Eleventh Amendment. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100, 120-21 (1984) (under the Eleventh Amendment, agencies of the state are immune from private actions or suits brought in federal court “regardless of the nature of the relief sought”); *Alabama v. Pugh*, 438 U.S. 781 (1978) (per curiam). Although claims premised on the statutory or common law of a state can be filed as “pendent” to claims asserted under certain federal statutes such as Title VII,

1 the Eleventh Amendment operates to preclude the federal court from entertaining the pendent claims.
 2 *Id.* Thus, all of Plaintiff's pendant state law claims asserted against the Nevada System of Higher
 3 Education, College of Southern Nevada must be dismissed. However, the Court recommends
 4 dismissing these claims without prejudice so that, if Plaintiff chooses to do so, he may file these
 5 claims in state court.

6 D. Plaintiff's Title VII Claims of Retaliation and Race Discrimination are not Barred by
 7 Immunity.

8 The U.S. Supreme Court holds "that in enacting Title VII, Congress properly abrogated the
 9 states' Eleventh Amendment immunity for such suits." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456-57
 10 (1976) (holding that Title VII of the Civil Rights Act of 1964 abrogates the states' Eleventh
 11 Amendment immunity). Thus, Plaintiff's Title VII claims are not barred by the Eleventh
 12 Amendment and, if other prerequisites to bringing these claims are met, Plaintiff may ultimately be
 13 able to proceed in federal court against the Nevada System of Higher Education under Title VII.
 14 *Anderson v. Nevada ex rel.*, Case No. 3:09-cv-00460-ECR-RAM, 2010 WL 11594887, at *2 (D.
 15 Nev. Jan. 28, 2010).

16 **III. Order**

17 Accordingly, IT IS HEREBY ORDERED that Plaintiff's application to proceed *in forma*
 18 *pauperis* (ECF No. 1) is GRANTED.

19 **IV. Recommendation**

20 IT IS HEREBY RECOMMENDED that Plaintiff's First, Second, and Third Causes of Action
 21 asserting state law claims under NRS 613.330 and 613.340 be dismissed without prejudice to allow
 22 Plaintiff to proceed in state court on these claims if he so chooses. The Court further recommends
 23 that the Order make clear these claims may not be refiled in federal court.

24 IT IS FURTHER RECOMMENDED that Plaintiff's Second and Fourth Causes of Action
 25 under Title VII be dismissed without prejudice. Plaintiff fails to demonstrate he exhausted
 26 administrative remedies, which he must do before he may bring these claims in federal court.

1 IT IS FURTHER RECOMMENDED that Plaintiff's Third Cause of Action asserting
 2 violations of the ADEA be dismissed with prejudice because these claims are barred by the Eleventh
 3 Amendment.

4 IT IS FURTHER RECOMMENDED that if Plaintiff chooses to file an amended complaint
 5 demonstrating exhaustion of administrative remedies regarding his Title VII claims, the filing must
 6 be titled "Amended Complaint." The amended complaint must contain a short and plain statement
 7 demonstrating exhaustion of administrative remedies and the factual basis for Plaintiff's claims.

8 Plaintiff is advised that if he files an amended complaint, the original complaint (ECF No.
 9 1-1) no longer serves any function in this case. As such, the amended complaint must be complete
 10 in and of itself without reference to prior pleadings or document. The Court cannot refer to a prior
 11 pleading or other documents to find Plaintiff's amended complaint is complete.

12 IT IS FURTHER RECOMMENDED that Plaintiff must file an amended complaint, if any,
 13 on or before **September 19, 2022**.

14 IT IS FURTHER RECOMMENDED that if Plaintiff fails to abide by the terms of this
 15 Recommendation, Plaintiff's action be dismissed without prejudice in its entirety.

16 DATED this 18th day of August, 2022.

17 
 18 ELAYNA J. YOUCHAH
 19 UNITED STATES MAGISTRATE JUDGE

20 **NOTICE**

21 Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be
 22 in writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court has
 23 held that the courts of appeal may determine that an appeal has been waived due to the failure to file
 24 objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also
 25 held that (1) failure to file objections within the specified time and (2) failure to properly address
 26 and brief the objectionable issues waives the right to appeal the District Court's order and/or appeal
 27 factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir.
 28 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).